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COURT OF APPEALS OF WISCONSIN
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-
Respondent,

v.

Appeal No. 2017AP2536-CR

RONNIE CECIL PEEBLES,

Defendant-
Appellant.

Appeal from Circuit Court for Waushara County
The Honorable Guy D. Dutcher, Presiding,
Case No. 16-CM-477

**PLAINTIFF-RESPONDENT STATE OF WISCONSIN'S
RESPONSE BRIEF**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE CASE	1
ARGUMENT	1
I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PEEBLES’ MOTION FOR ADJOURNMENT.	1
A. Applicable Legal Principles And Standards Of Review... 1	
B. Application Of Principles And Standards To Facts Of This Case.	3
CONCLUSION.....	8
FORM AND LENGTH CERTIFICATION.....	9
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	10
CERTIFICATION OF MAILING.....	11
SUPPLEMENTAL APPENDIX CERTIFICATION.....	12
ELECTRONIC FILING OF SUPPLEMENTAL APPENDIX CERTIFICATION.....	14
SUPPLEMENTAL APPENDIX TABLE OF CONTENT.....	15

TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
<i>Avery v. Alabama</i> , 308 U.S. 444 (1940).....	3
<i>Elam v. State</i> , 50 Wis. 2d 383, 184 N.W.2d 176 (1971).....	1
<i>Giacalone v. Lucas</i> , 445 F.2d 1238 (6th Cir. 1971).....	3
<i>Phifer v. State</i> , 64 Wis. 2d 24, 218 N.W.2d 354 (1974).....	1, 2, 3
<i>State v. White</i> , 53 Wis. 2d 549, 193 N.W.2d 36 (1972).....	1
<i>State v. Wollman</i> , 86 Wis. 2d 459, 273 N.W.2d 225 (1979).....	2, 6, 7

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2. Instead, the State will present additional facts in the “Argument” portion of its brief.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PEEBLES’ MOTION FOR CONTINUANCE

A. Applicable Legal Principles And Standards Of Review

“The granting or denial of a continuance is within the discretion of the trial court.” *Phifer v. State*, 64 Wis. 2d 24, 30, 218 N.W.2d 354 (1974) (citing *State v. White*, 53 Wis. 2d 549, 554, 193 N.W.2d 36 (1972); *Elam v. State*, 50 Wis. 2d 383, 389, 184 N.W.2d 176 (1971)). “A denial of a continuance potentially implicates the

Sixth Amendment right to counsel and the Fourteenth Amendment right to due process of law.” *State v. Wollman*, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979) (*citing Phifer*, 64 Wis. 2d at 30-31). “In determining whether a court has abused its discretion by the denial of a continuance, a single inquiry is to be made. This inquiry requires the balancing of the defendant’s constitutional right to adequate representation by counsel against the public interest and the prompt and efficient administration of justice. As in all reviews of alleged abuse of trial court discretion, this balancing test must be done in light of all the circumstances that appear of record.” *Id.* (*citing Phifer*, 64 Wis. 2d at 31).

“[T]he constitutional right to counsel includes the right to consultation between client and attorney and the opportunity for preparation for trial but also noted that the Constitution does not require any particular interval between the appointment of counsel and trial. The mere denial of a motion for continuance does not in itself deny the constitutional right to assistance of counsel. The determination of whether a continuance is to be granted lies within the discretion of the trial court, but an opportunity to confer, to consult, and to prepare for trial must be given.” *Wollman*, 86 Wis. 2d at 468-69 (*citing Avery v. Alabama*, 308 U.S. 444, 446 (1940)).

The Supreme Court of Wisconsin in *Phifer* applied a balancing test “to review the exercise of a trial court’s discretion on a request for the substitution of trial counsel with the associated request for a continuance.” *Phifer*, 64 Wis. 2d at 31. Factors adopted by the *Phifer* Court included: “1. The length of the delay requested; 2. Whether the ‘lead’ counsel has associates prepared to try the case in his absence; 3 Whether other continuances had been requested and received by the defendant; 4. The convenience or inconvenience to the parties, witnesses and the court; 5. Whether the delay seems to be for legitimate reasons; or whether its purpose is dilatory; 6. Other relevant factors.” *Id.* (citing *Giacalone v. Lucas*, 445 F.2d 1238, 1240 (6th Cir. 1971)).

B. Application Of Principles and Standards To Facts Of This Case.

Peebles contends that the failure to adjourn the start of his trial due to his health was error. Appellant’s brief at 6-11. Peebles is entitled to no relief on this claim for two reasons.

First, the trial court reasonably and properly exercised its discretion under the balancing test used when reviewing a denial of a continuance. The record clearly reflects that the trial court considered the defendant’s physical condition and balanced that

against the community's and court's interest in the efficient administration of justice.

Peebles's trial counsel, Larry Lloyd, explained to the trial court that Peebles "was very ill with some sort of a stomach virus or whatever the case may be" and Peebles did not appear to Attorney Lloyd "to be well enough to be placed on the stand to actually go forth with proceedings today." R: 44-3; Appellant's App. at 3. The trial court noted that Peebles did not provide notice of his alleged illness until 7:30 a.m. the morning of trial when he called to say he was not coming. R: 44-4; Appellant's App. at 4. The trial court noted Peebles professed illness "without any type of objective affirmation of his condition." R: 44-4; Appellant's App. at 4. No evidence is in the record of any medical testimony or documentation presented to the trial court corroborating Peebles's alleged illness.

The trial court noted that the case had been "dragged out through the process for nearly a year" and had been dragged out with multiple status conferences. R: 44-4; Appellant's App. at 4. The trial court stated, "[w]e just haven't made progress." R: 44-4; Appellant's App. at 4. The trial court concluded that it was "in a position where it must conclude that there is a reticence on Mr. Peebles's part to proceed to the ultimate determination that needs to

be undertaken by the Jury to bring this matter to a conclusion, and today is the day.” R: 44-4-5; Appellant’s App. at 4-5.

The trial court considered what would have been involved if the trial had to be rescheduled. The State noted that all of the State’s witnesses were subpoenaed. R: 44-3; Appellant’s App. at 3. The State explained that the county’s only two-day road officers scheduled for that day were present in court and additional officers had to be brought in to fill in for the officers at trial. Transcript at 3. The State noted that the victim in the case took a day off of work to be present for trial. R: 44-3-4; Appellant’s App. at 3-4. The trial court observed that, “[t]here has been a great deal of effort, and a lot of resources have been invested in making our court operable for a jury trial today.” R: 44-4; Appellant’s App. at 4. The trial court noted that the jury was ready and counsel was present. R: 44-4; Appellant’s App. at 4.

Second, the court objectively made the correct conclusion in denying Peebles’s request to continue the case as no prejudice has been established. Peebles argues that a determination was not made “regarding the nature of Peebles’s illness or how that illness may impact his ability to participate in the proceedings.” Appellant’s brief at 9. However, the record answers that question. Prior to the

jury entering the courtroom, and while pretrial motions were being discussed, Peebles returned to the court. R: 44-8; Appellant's App. at 8. No evidence is in the record nor argument made by Peebles that he did not actively participate in the trial proper following his return. Following the State resting its case, the trial court held a colloquy with Peebles regarding his Fifth Amendment right and Sixth Amendment right regarding testifying and not testifying. R: 44-98-100; Respondent's App. at 16-18. Peebles told the trial court that he had an adequate opportunity to discuss this issue with trial counsel. R: 44-100; Respondent's App. at 18. Peebles then proceeded to take the stand and testify. R: 44-101-109; Respondent's App. at 19-27.

No evidence is in the record that Peebles did not have adequate opportunity to confer, consult, and prepare with trial counsel. No evidence is in the record that Peebles's trial counsel performed poorly at trial. Like in *Wollman*, this record "is devoid of either actual prejudice, in the sense that the time for preparation was fundamentally unfair, or of any specific prejudice, in the sense that the defendant was denied either due process or the effective right of counsel, because it would be reasonable to assume that more

adequate preparation would have provided a more effective defense.”

Wollman, 86 Wis. 2d at 470.

In light of all the facts and circumstances of the case, the trial court properly balanced the possible prejudice to Peebles against the clear prejudice to the administration of justice when it declined to continue the case. The trial court did not abuse its discretion by denying the requested continuance.

CONCLUSION

For the foregoing reasons, this Court should affirm Peebles's judgment of conviction and deny his motion for postconviction relief.

Dated this 28th day of June, 2018.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) as to form and certification for a brief and appendix produced with a proportional serif font (Century 13 pt. for body text and 11 pt. for quotes and footnotes). The length of this brief is 1,404 words.

Dated this 28th day of June, 2018.

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**CERTIFICATION OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify, pursuant to Wis. Stat. § 809.19(12)(f), that the text of this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of June, 2018.

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CERTIFICATION OF MAILING

I hereby certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on June 28, 2018. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 28th day of June, 2018.

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